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No. 75-699

In the Supreme Court of the United States

OCTOBER TERM, 1975

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

LEON GOLDFARB

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In response to appellee's motion to affirm, we stress two principal points: first, the focus of equal protection analysis in a Social Security case such as this properly is upon the rationality of the denial of benefits to the category of potential beneficiaries of which the individual complainant is representative; second, the denial of benefits to appellee and other similarly situated men is rational. We take up these two points in reverse order.

1. The Social Security Act, 49 Stat. 620, as amended, 42 U.S.C. 301 *et seq.*, provides a variety of dependency benefits for persons who were in fact, or, in some cases, may be presumed to have been, economically dependent upon a disabled, retired, or deceased wage-earner. In particular, the widower of a deceased female wage earner is entitled to such dependency benefits upon a showing,

inter alia, that his primary insurance amount under the Act is less than his deceased wife's and that he was in fact economically dependent upon his wife prior to her death. 42 U.S.C. 402(f)(1)(D); 42 U.S.C. (Supp. III) 402(f)(1)(E).

a. Appellee is a widower. Because he was employed during his working years by the federal government, his earnings were not subject to the FICA tax or covered by Social Security. See Complaint, para. 7; 26 U.S.C. 3121(b)(6); 42 U.S.C. 410(a)(6).[1] Since his wife's earnings as a nonpublic employee were covered by Social Security, her primary insurance amount under the Act was greater than his. But appellee had not been economically dependent upon his wife. Accordingly, he was ineligible for widower's insurance benefits after her death.

In this suit, appellee challenges the requirement that he show actual dependency as a condition of eligibility. He contends that male public employees, and other nondependent men whose lifetime incomes were not covered by Social Security, are constitutionally entitled to dependency benefits.

Appellee understandably does not suggest that extension of dependency benefits to such nondependent individuals would conduce to a more rational allocation of scarce

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[1]Men who were nondependent because of covered earnings ordinarily will be ineligible for either widower's or husband's insurance benefits because their primary insurance amounts will exceed the maximum allowable. This is especially true with regard to husband's insurance benefits, which, like the correlative wife's insurance benefits, are available only to individuals whose primary insurance amounts are less than half their spouses. See 42 U.S.C. (Supp. III) 402(b)(1)(D); 42 U.S.C. 402(c)(1)(D). Thus the principal group of nondependent men that would be affected by the removal of the dependency requirement would appear to be that of former public employees whose earnings were not covered by Social Security.

Social Security funds. Payments of dependency benefits to nondependent men such as appellee would not serve the underlying statutory objective of providing support for the dependents of disabled, retired, or deceased wage-earners. If appellee had worked for the same salary as a private rather than a public employee during his career, he would have been doubly ineligible for widower's insurance benefits: his primary insurance amount would have exceeded the maximum allowable (see note 1, *supra*), and he also would have failed the test of dependency. There is no reason related to the purposes and objectives of the Act why his public employment should change the result of ineligibility. There is no reason why, as a retired public employee, he should be entitled to both Social Security dependency benefits and his federal pension.[2]

b. Appellee's argument does not, of course, rest upon the rationality of extending dependency benefits to individuals such as himself but rather upon a perceived unfairness, of allegedly constitutional magnitude, in the different treatment of men and women under the Act: since a woman may receive widow's insurance benefits without proof of actual economic dependency on her deceased husband (42 U.S.C. 402(e)), men are comparatively disfavored under the statutory scheme for the distribution of benefits. Our answer to this line of argument is twofold: first, the different treatment of female beneficiaries may be justified by the social and economic realities that pertained during the working lives of the generation now of retirement age; second, to the extent that Congress has included nondependent wives within

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[2]Indeed, it could be argued that to award Social Security dependency benefits to nondependent federal pensioners such as appellee would be to discriminate against those recipients of Social Security pensions whose primary insurance amounts disqualify them from eligibility for dependency benefits.

the presumption of dependency for married women, the Constititution does not require that this Court enlarge upon that limited degree of over-inclusion by extending dependency benefits to nondependent men as well.

i. The Social Security Act presumes that a widow whose primary insurance amount is less than that of her deceased husband was economically dependent on him. Even for the generation of current beneficiaries—the only generation relevant to an assessment of the rationality of the allocation of benefits under the Act[3]—this statutory presumption will in some cases be inaccurate, since some nondependent widows, especially former public employees, will receive benefits as a consequence of that presumption. It seems highly probable, however, because of the social and economic realities that pertained during the working lives of individuals now of retirement age, that a widow of that age whose individual primary insurance benefits are less than her deceased husband's was in fact economically dependent upon her husband during his lifetime.[4] In view of this likely fact, it was not manifestly irrational for Congress to extend a presumption

[3]In attempting to show the irrationality of the presumption of dependency, appellee appears to rely solely upon statistics relating to the present national workforce. See Mot. to Aff. 5, n. 6. Those statistics shed no light upon the proportion of presently retired widows who were economically independent during their husbands' lifetimes. It is the latter proportion that bears upon the rationality of Congress' use of a presumption of dependency for the present generation of retirement-age women. It may be that in the future, as women now of working age enter retirement, the trend toward greater participation by women in the workforce will undercut the factual basis of that presumption, but that point has not yet been reached.

[4]The converse is not similarly likely to be true. We believe it highly likely that a large proportion of the men now of retirement age whose individual primary insurance amounts are less than their wives' were economically independent because of the receipt of incomes, through public employment or otherwise, that were not covered by Social Security.

of dependency to such women. Congress could have made the legislative judgment that a proof-of-support requirement for aged wives and widows with no primary benefits, or with smaller benefits than their husbands, would unnecessarily burden such women and unjustifiably increase the cost and administrative complexity of the program.[5] Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 776-777, 781-785.

ii. In any event, a degree of over-inclusion in the legislative standard for dependency would not justify judicial enlargement of the class of beneficiaries to embrace nondependent men as well. Due process, in cases such as this, requires only that the statutory classification be rationally related to permissible legislative objectives. The requirement that men prove actual dependency as a condition of eligibility for widower's insurance benefits is rationally related to the permissible legislative objective of restricting this general category of social welfare payments to the provision of support to the dependents of disabled, retired, or deceased wage-earners. The fact that Congress has adopted a standard that proves in particular cases to be over-inclusive in terms of the statutory objective does not constitutionally require that the objective be abandoned wholesale. See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 776-777.[6]

[5]"[A] proof-of-support requirement for women as well as men would substantially increase the administrative complexity of the program * * *." Reports of the Advisory Council on Social Security 29 (1975), reprinted at Hearings on Financing the Social Security System before the Subcommittee on Social Security of the House Committee on Ways and Means, 94th Cong., 1st Sess., pp. 165, 207 (1975).

[6]In the last analysis, any unfairness caused by the discrepancies in treatment between men and women in a complex social welfare scheme such as that created by the Social Security Act must be finally resolved by Congress and not the courts. One recent proposal

2. Appellee seeks to characterize this as a case involving not the allocation of non-contractual benefits but rather the scope of insurance coverage: his principal argument is that to subject men, but not women, to a dependency test is to " 'deprive women of protection for their families which men receive as a result of their employment' " (Mot. to Aff. 4, quoting from *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 645). Appellee fundamentally misconceives the nature of the Social Security program in analogizing it to a system of private insurance.

The Social Security system comprehends a bifurcated program of taxation and benefits. The system imposes income taxes on workers and excise taxes on their employers; it simultaneously appropriates those current revenues to provide Social Security benefits to former workers and their dependents in partial replacement of lost earnings. This Court has expressly noted that that system is basically unlike a system of private insurance *(Flemming* v. *Nestor,* 363 U.S. 603, 609-610):

> * * * [E]ach worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation. It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.

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that may hold promise is that the dependency requirements for husbands' and widowers' benefits be removed but that "[*t*]*he law* [*also*] *be changed so that a pension based on work in noncovered employment would affect entitlement to and the amount of secondary benefits under social security in the same way that a primary social security benefit does.*" Reports of the Advisory Council on Social Security, *supra,* at 27, reprinted at Hearings, *supra,* at 205 (emphasis in original). Adoption of this proposal would eliminate the "gender differentiation" (Mot. to Aff. 3) of which appellee complains without the apparent impropriety that would be entailed in the payment of dependency benefits to appellee and other similarly situated retired public employees.

Accordingly, to ask, as appellee does here, whether one class of taxpayers is purchasing the same amount of "protection" or insurance coverage for its tax dollars as another class of taxpayers is to ask a question that should be irrelevant to the constitutionality of either the taxing provisions or the benefit provisions. Those tax dollars do not buy insurance coverage; they are simply the source of transfer payments to provide for the general welfare. "In essence, the plan transfers money from one generation to another with the amount taken from the one generation being measured by the other generation's benefit requirements." Reports of the Advisory Council on Social Security, *supra,* at 45, reprinted at Hearings, *supra,* at 223.

By asserting his deceased wife's claim to equal insurance protection as a Social Security taxpayer, appellee is in fact contesting the disposition of her tax payments; but Social Security taxes are not earmarked for the account of any individual taxpayer, and no taxpayer has standing to challenge the disposition of his taxes. *United States* v. *Richardson,* 418 U.S. 166; *Frothingham* v. *Mellon,* 262 U.S. 447.

Moreover, to view the question as if it turned on the comparability of insurance coverage under the Act is to invite invidious comparisons between wage-earners who have dependents and those who do not, and between wage-earners who have few dependents and those who have many. The Social Security system is simply not designed to equalize taxes and benefits, or to extend comparable "insurance protection" to all covered wage-earners. Indeed, it is not an "insurance" scheme at all.

It is a system for redistributing income from current wage-earners to former wage-earners and their dependents, and the constitutionality of its provisions must be judged in that light and not from the oblique viewpoint of taxpayers who claim to have been shortchanged. In short, the focus of equal protection analysis must be upon the rationality of the allocation of benefits among potential beneficiaries, not upon the allocation of insurance "protection" among taxpayers.[7] And, as we have shown (pp. 1-6, *supra*), the allocation of benefits is rational.

For the reasons stated above and in the jurisdictional statement, probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[7]It is, however, instructive that female wage-earners as a class appear to be "over-protected" in relation to male wage-earners. We are informed by the Office of the Chief Actuary, Social Security Administration, that female wage-earners, and their employers on their behalf, pay only 28 percent of all FICA taxes, whereas 34 percent of all Social Security benefits are paid to retired female wage-earners and their dependents.